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IN THE

Supreme Court of the United States

OCTOBER TERM, [illegible] 1979

No. [illegible] 295

PAUL HENRY SWIERINGA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

PAUL HENRY SWIERENGA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Paul Henry Swierenga prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 21, 1970.

OPINION BELOW

The per curiam opinion of the Court below is not yet reported. It is reproduced as Appendix A herein.

JURISDICTION

The opinion and judgment of the Court below were entered on April 21, 1970, affirming petitioner's conviction on January 27, 1969, in the United States District Court for the Eastern District of Michigan for violating 50 U.S.C. App., Section 462(a). On May 27, 1970, Mr. Justice Stewart signed an order extending the time for filing this petition for writ of certiorari to and including June 21, 1970. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether a Local Board may, despite the requirements of Selective Service Regulation 1625.2 (32 CFR), refuse to reopen a registrant's classification and thereby refuse to consider on the merits a registrant's conscientious objector claim made pursuant to section six of the Selective Service Act, 50 U.S.C.App. 456 (j) on the sole ground that the claim was made subsequent to the order for induction?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

50 U.S.C.App., Section 456(j):

> "(j) Conscientious Objectors. — Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Selective Service Regulations, 32 C.F.R. Section 1625.2:

> "The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

STATEMENT OF THE CASE

On August 29, 1966, Petitioner, who had been classified as 1-A by his local Board, was mailed an induction notice ordering him to report for induction on October 11, 1966. On September 3, 1966, he wrote to the Board requesting a 60-day extension of his induction date for business reasons. In a letter dated September 7, 1966, Petitioner was informed that his request had been denied.

On September 19, 1966, Petitioner wrote asking reconsideration of his request for extension. On September 20, 1966, the local Board responded as follows:

> "The local Board will consider postponing your induction for sixty days if you will sign an application for voluntary induction to be forwarded for induction with our December, 1966 or January 1967 quota." (App., 23).

The Petitioner replied on September 22, 1966 as follows:

> "Thank you for reviewing my file once again and reconsidering my application for a sixty day extension. Because you are willing to give me the sixty days is evidence to me that you realize that my request was not only valid, but also reasonable and necessary.
>
> However, I cannot comply with your stipulation that I must first volunteer for the draft. This is directly against my religious principles. As a Christian, I do not believe it is for me to Judge when another man shall die, or to take his life. If I volunteer, the blood is on my hands and I shall be judged for it.
>
> I am awaiting your reply." (App., 23)

The following day, the Clerk of the Local Board acknowledged receipt of the letter and, based upon telephonic communication with three members of the Board, reported to Petitioner that "the Board will not issue a Postponement of Induction (SSS Form 264) and you will be required to report as originally scheduled" (App., 23-24).

On October 12, 1966, the Petitioner appeared at the Induction Station but refused to submit to induction. He stated:

> "I, Paul Swierenga, refuse to be inducted into the Army of the United States because as I stated in my letter to my Local Board, as a Christian I do not believe it is for me to Judge when another man shall die or take his life." (App., 24).

On January 25, 1967, Petitioner requested and received a copy of SSS Form 150, the special form for conscientious objectors, which he filed on February 1, 1967. The Local Board has taken no action on this formal request for a change in classification and it was never considered in any formal manner by the Board.

Petitioner was indicted for refusing to submit to induction as ordered by his local Board. A jury trial having been waived, trial was had by the Court. The Petitioner moved for acquittal on the ground that the local Board did not give appropriate attention to his claim of conscientious objection. The Trial Court took the matter under advisement and held up formal opinion awaiting the decision of the Sixth Circuit Court of Appeals in *United States v. Watson Woodson Jennison, Jr.*, 402 F.2d 51 (6th Cir. 1968). Relying heavily on the *Jennison* decision, the Court denied Petitioner's motion and found him guilty as charged. Petitioner was sentenced on July 1, 1969 to a term of 4 to 5 years and is currently free on bond pending appeal.

On April 21, 1970, the Court of Appeals for the Sixth Circuit affirmed Petitioner's conviction in a per curiam decision relying on its earlier decision in *Jennison* and other cases in which that Court held that a Registrant whose conscientious objector claim is made after the date of mailing of his induction notice, is not entitled to have that claim considered by the Board regardless of the circumstances of that claim or when his views crystallized. (Opinion, *United States v. Swierenga,* #19862, April 21, 1970, App. 19-21.)

In view of the unusual circumstances of this case, some further reference to the factual background of Petitioner's conscientious objection claim may be helpful.

Petitioner testified at trial that when he received his induction notice his first concern was to make some arrangements to save a small business he had started and to find some suitable way to provide for his family responsibilities.

Regarding his beliefs, Petitioner testified that he had not known or thought about what it meant *legally* to be a conscientious objector and that he did not realize he should ask for the Form 150 but instead wrote to the Board on September 22, 1966, and tried to express his religious beliefs and his abhorrence of taking a human life (Tr. 61, App. 29-30).

He testified further that he had been concerned about his family and business and did not realize he would be expected to kill until he received the letter from the Board informing him that he could have a postponement on the condition that he voluntarily submit to induction (Tr. 61, App., 23).

He first discovered that his beliefs, as they had matured, were within the conscientious objection definition when he

consulted his brother who advised him to seek counselling. As soon as he realized that he should file Form 150, Petitioner obtained the form and filed it with the Board (Tr. 70-71, App. 24).[1]

Thus, Petitioner's declaration of belief contained in his letter of September 22, 1966, his statement on Induction day in October, 1966 and his formal submission of Form 150 were never given formal consideration in any manner by the Board.

REASONS FOR GRANTING THE WRIT

The issue in this case is a simple one.

Does a man subject to induction forever forfeit his right to claim the status of conscientious objector simply because he failed to make his claim before the arbitrary, unknown, and unpredictable date of the mailing of his induction notice?

The question is one which has been passed on by various courts of appeals with varying results and is currently before this Court in *William Ward Ehlert v. United States of America,* No. 1383, an appeal from the Ninth Circuit. (Certiorari granted on May 4, 1970, 7 Cr.L. 4027, May 6, 1970.)

This Court should resolve the conflict now existing among the various federal appellate courts. The problem facing the Court is one of interpretation of laws which are federal in nature and which must apply equally to all

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[1] The foregoing references to Petitioner's testimony represent an extension of his position as set forth in his letter to the Board on January 25, 1967 (App. 29-30).

of the citizens of the United States subject to the draft in different parts of the country. In the absence of a resolution of the existing conflict by this Court, the anomalous situation will continue and the fate of an inductee who has for some reason failed to make a pre-induction order claim of conscientious objection will rest merely on the accident of geography.

Many of the Courts who have considered this problem and placed a restrictive interpretation on Selective Service Regulation 1625.2 have done so out of fear that a contrary position would hamper the administration of the draft laws, a result deemed inimical to the welfare of the country.

A reading of the decisions giving a broader interpretation to the Regulation, i.e. the *Gearey* rule, clearly illustrate that such a fear is completely unfounded.

In most of the decisions in which the question has been resolved in favor of viewing the late crystallization of religious beliefs as a possible "change of status" within the meaning of Section 1625.2, the Registrants involved have been found after due consideration *not* to have shown such a crystallization. See, e.g. *United States v. Gearey,* 266 F Supp 161 (SD N.Y. 1967) on remand, aff'd 379 F.2d 915 (2d Cir. 1967), cert denied 389 U.S. 959 (1967).

The effect therefore of a favorable decision by this Court would not be to deplete the ranks of the armed services by allowing last minute claims for exemption but, on the contrary, would *merely* allow those claims to be presented for consideration.

The Board, upon consideration of a Registrant's claim, may then clearly reject it and find that there has not been a crystallization of beliefs following receipt of the induction notice as required by *Gearey.* The case in which a young man's beliefs have genuinely crystallized following

receipt of such a notice will be, we submit, rare indeed. This has already been the case in the decisions following the *Gearey* rule.

The law does not on its fact place any limitations and restrictions on the right of a conscientious objector to refuse military service. However, as viewed by the Sixth Circuit and others, it is incredibly circumscribed.

Petitioner seeks merely a declaration by this Court that late submission of a claim for conscientious objection does not *automatically* foreclose consideration of his claim but rather that the claim may be considered and the Registrant's position upheld if the Board finds that the crystallization of belief is a "change of status due to circumstances beyond the control of the Registrant" as described in the Regulation.

In the absence of such a finding the claim would be denied under the *Gearey* rule.

1. THE COURTS OF APPEALS ARE IN CONFLICT

Petitioner stands convicted of an offense of which he would have been acquitted in the Second and Tenth Circuits. By an accident of geography, his fate has been determined because of the cannonization of dictum found in the case of *Jennison v. United States*, 402 F.2d 51 (6th Cir. 1968).

It is axiomatic that criminal convictions should not rest upon simple choices of residence, particularly when that conviction is based upon a violation of federal law.

However, because of the present state of conflict in the law among the circuits, the answer to the question of whether or not under Selective Service Regulation §1625.2

a registrant has an opportunity to present a claim for conscientious objection after the mailing of his induction notice, depends solely upon where that registrant happens to live.

Petitioner is barred from making such a claim because he was indicted in an area under the jurisdiction of the Sixth Circuit Court of Appeals. Whichever way this Court decides the basic question itself, the conflict should be resolved.

The Second and Tenth Circuits have held that there is nothing in Regulation §1625.2 which bars consideration of a late filed claim of conscientious objection, provided the registrant can demonstrate that such a claim is based upon the late crystallization of belief so as to constitute a change of circumstances over which the registrant has no control, within the meaning of the Regulation. *United States v. Gearey,* 368 F.2d 144 (2d Cir. 1966), cert. denied 389 U.S. 959 (1957); *United States v. Sandbank,* 403 F.2d 38 (2d Cir. 1968) (dictum), cert. denied 394 U.S. 961 (1969); *United States v. Stafford,* 389 F.2d 215 (2d Cir. 1968); *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959); *Martinez v. U.S.,* 384 F.2d 50 (10th Cir. 1967) (dictum), cert. denied 390 U.S. 1016 (1968); *United States v. Maine,* 417 F.2d 951 (10th Cir. 1969) (dictum).

The Fourth, Fifth, Sixth, Seventh and Ninth Circuits hold to the contrary position. *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966); *United States v. Helm,* 386 F.2d 434 (4th Cir. 1967) cert. denied 390 U.S. 958 (1968); *Davis v. United States,* 374 F.2d 1 (5th Cir. 1967); *United States v. Jennison,* 402 F.2d 51 (6th Cir. 1968) (dictum), cert. denied 394 U.S. 912 (1969); *United States v. Taylor,* 351 F.2d 228 (6th Cir. 1965); *United States v. Mulloy,* 412 F.2d 421 (6th Cir. 1969) (dictum);

United States v. Schoebel, 201 F.2d 31 (7th Cir. 1953); *Porter v. United States*, 334 F.2d 792 (7th Cir. 1964): *Ehlert v. United States*, — F.2d— (9th Cir. Feb. 1970), cert. granted May 4, 1970.

The First, Third and Eighth Circuits have not yet passed on this question but District Courts in those Circuits have generally followed *Gearey*.[2]

The instant case is therefore an appropriate one for review under Supreme Court Rule 19.1 (b).

2. THE GEAREY RULE CLEARLY REFLECTS THE MOST RATIONAL INTERPRETATION OF REGULATION 1625.2

Title 50 USC Appendix, Section 456(j) provides:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Although there are persuasive arguments to the contrary[3] based upon the explicit language of Title 50, Section 456(j) quoted above, Petitioner accepts for purposes of argument the position of the majority of courts that this Title is subject to and conditioned upon the procedural requirements of Section 1625.2, Title 32, CFR.

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[2] See, e.g. *United States v. Blaisdell*, 294 F Supp 1303 (D.C. Me. 1968); *United States v. Skinner*, Cr. No. 6862, 1 Sel. Serv.L.R. 3042 (DC NH 1968); *United States v. Brown*, 129 F Supp 237 (DC NJ 1955); *United States v. Underwood*, 151 F Supp 874 (ED Pa 1955); *United States v. Hinch*, 292 F Supp 696 (DC Mo 1968).

[3] *United States v. Underwood*, 151 F Supp 874 (ED Pa 1955); *United States v. Crawford*, 119 F.Supp. 729 (ND Calif. 1954); See also dissenting opinion by J. McCree, in *United States v. Jennison*, *supra*.

This section provides in part:

> "The local board may reopen and consider anew the classification of a registrant
>
> (a) upon the written request of the registrant . . . (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) . . . *unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.*" (Emphasis added.)

There is nothing in Title 50 Appendix nor in the Regulation itself which supports the kind of limitation which has been engrafted upon it by some courts.

The better rule and one which is completely in line with both the spirit and letter of the Regulation in question is that represented by *United States v. Gearey, supra.* In *Gearey,* the Court accepts Regulation 1625.2 as a reasonable limitation on the right to make a conscientious objection claim but, unlike other courts, refuses to read into it a bar to making such a claim following mailing of the Notice of Induction.

The position of the Court in *Gearey* was developed both in accordance with the explicit terms of the regulation and in recognition of the concern of all courts relating to the efficient and fair operation of the Selective Service System. This concern is reflected in the discussion in *Gearey, supra, Keene v. United States, supra,* and other courts who have embraced the *Gearey* rationale. See, *e.g. Hinch v. United States,* 292 F. Supp. 696 (DC Mo 1968).

It should be emphasized that the burden imposed upon the Registrant by *Gearey* is not an easy one to discharge. *Gearey* held that the conscientious objection claim can mature or "crystallize" after a Registrant has received his notice of induction, and that under such circumstances this *may* constitute a change in status due to circumstances beyond his control. After remand in *Gearey,* to determine when that Registrant's beliefs had matured, he was unable to discharge the burden imposed upon him by the Regulation as interpreted by the *Gearey* Court.

It is suggested that the reason that more courts have not had to take a position similar to *Gearey* concerning the "maturation" date of conscientious objection beliefs is simply because in most of the cases in which the question has been considered, it was clear that the belief belatedly raised, where sincere, had developed over a lifetime or in adolescence sometime prior to the receipt of the induction order.

This was the case in *Jennison v. United States, supra.*

The position of the Sixth Circuit is unclear but *Jennison* has become the major authority for the Sixth Circuit's alignment with those circuits ruling contrary to *Gearey.*

In *Jennison,* the Court appeared to embrace both approaches to the question. The Court's main reliance was on the Sixth Circuit case of *United States v. Taylor,* 351 F.2d 228 (6th Cir. 1955), a case in which there was no question of a post-induction notice crystallization of conscientious objector views which could have brought *Taylor* within the requirements of Section 1625.2.

The Sixth Circuit appeared to cite with approval the position of the Court in *Davis v. United States,* 374 F.2d

1 (5th Cir. 1967) in which a Registrant's conscientious objector form submitted after induction *was considered and rejected* by the Board as not constituting a change of status within §1625.2 and consequently the Board was correct in denying a reopening under that Regulation.

The *Jennison* court nonetheless devoted considerable discussion to whether or not the Board was justified in finding that no change of circumstances had been presented by the registrant. It should be emphasized that *Jennison* did *not* base its decision on the proposition that a late developing conscientious objection claim can *never* be such a change in circumstances but, rather, after a careful consideration of the facts—which would be a useless gesture under *Davis*—the Court concluded that it was clear that the Appellant's beliefs had matured prior to the receipt of the induction notice.

The Court then concluded:

> "We are satisfied that the Board made a reasonable and proper finding that the appellant's evidence did not meet *his burden of showing that his crystallization of conscientious objection occurred after receipt of his induction notice and was beyond his control.*" Id. at 54. (Emphasis added.)

Thus, while the *Jennison* decision is considered as precedent for application of a strict view of the requirements of Regulation 1625.2 in the Sixth Circuit, it actually applied the *Gearey* rule and even employed the terminology used in that case.

If this Court approves the *Gearey* position, the burden upon the Registrant will not be made any easier, nor will the efficient operation of the Selective Service System be hampered. On the other hand, it is a harsh doctrine to hold that *under no circumstances* may a claim for con-

scientious objection be raised or even considered following the arbitrary date of the mailing of an induction notice.

Section 1625.2 makes no such exclusion but simply speaks in terms of a change in status resulting from circumstances beyond the registrant's control. If the registrant can show that such a change in status did result, he should be entitled to that opportunity. Public policy, the intent of Congress and surely the explicit language of Regulation 1625.2 require no contrary result.

3. THE ISSUE IS SQUARELY PRESENTED BY THIS CASE.

In the Court below, the argument was raised that the Petitioner failed to assert his claim of conscientious objection until the post-induction date filing of the Form SSS 150 on February 1, 1967.

Petitioner did not first raise his conscientious objection claim subsequent to his refusal of induction, however, but presented it to the local Board on two occasions prior to their receipt of the official 150 form.

On September 22, 1966, Petitioner wrote to the local board in terms which were a clear statement of conscientious objection belief from a layman and at the very least should have put the Board on notice to make further inquiry.

Petitioner stated in his letter:

> "However, I cannot comply with your stipulation that I must first volunteer for the draft. This is directly against my religious principles. As a Christian, I do not believe it is for me to Judge when another man shall die, or take his life. If I volunteer, the blood is on my hands and I shall be judged for it.
>
> I am awaiting your reply." (App., 20)

There is no requirement in the law that the only manner in which a local board may be legally informed of a registrant's claim of conscientious objection after initial classification is by its receipt of the SSS Form 150. Neither Title 50 Appendix, the Regulations, nor the applicable authorities impose such a requirement on registrants. Any legally sufficient, adequate notice may reasonably be said to alert the Board of the existence of a CO claim with the duties and responsibilities which flow from the receipt of such information (e.g. sending the registrant a 150 form or by making further inquiry. See *Keene v. United States*, 266 F.2d 378 (10th Cir. 1959); *United States v. Vaughn*, 404 F.2d 586 (8th Cir. 1968); *United States v. Stafford*, 389 F.2d 215 (2d Cir. 1968).

As the Court emphasized in *United States v. Derstine*, 129 F. Supp. 117, 120 (DC Pa 1954):

> "Whenever a registrant in writing makes a request to a Local Board, no matter how ambiguously or unclearly the request is stated, if it indicates in any way a desire for a procedural right, the writing should be construed in favor of the registrant and the procedural right granted, or the registrant should be contacted by the Board to obtain clarification of what he had in mind when he made the request."

In addition, at the time of induction, Petitioner refused to be inducted and signed a statement which read as follows:

> "I, Paul Swierenga, refused to be inducted into the Army of the United States *because as I stated in my letter to my Local Board*, as a Christian I do not believe it is for me to Judge when another man shall die or to take his life." (App. 24) (Emphasis added.)

The Petitioner's Local Board was clearly aware of his attempt to assert his status as a conscientious objector long before its receipt of his official 150 form.

The Trial Court clearly considered this case bound by the ruling of the Sixth Circuit in *Jennison v. United States, supra*, and in fact held up decision in this matter pending the Court's ruling in *Jennison*.

The Court of Appeals, in a per curiam opinion, upheld Petitioner's conviction without discussion, citing *Jennison* and similar cases.

Thus the issue of whether or not Petitioner had a right to present his conscientious objector claim to the Board for consideration following receipt of an induction notice if he could fulfill the requirements of Regulation 1625.2 is clearly presented by this case.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated, June 12, 1970.

APPENDIX

No. 19862

UNITED STATES COURT OF APPEALS

for the Sixth Circuit

United States of America,
Plaintiff-Appellee,

v.

Paul Henry Swierenga,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

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DECISION OF THE UNITED STATES COURT OF APPEALS

Decided April 21, 1970

Before: Phillips, Chief Judge, Celebrezze and Combs, Circuit Judges.

Per Curiam. Defendant-appellant was indicted for refusal to submit for induction into the Armed Forces in violation of 50 U.S.C. App. §462(a). The district court, sitting without a jury, found him guilty and imposed sentence of four years imprisonment. The defendant appeals.

Defendant was mailed an induction notice on August

29, 1966, ordering him to report on October 11. On September 3, he made written request for a 60-day extension to enable him to train someone to maintain his business, a sole proprietorship. Upon receipt of the draft board's denial of this request, he contacted an attorney who wrote the board a letter dated September 13, 1966, containing this statement:

> "It is not the desire of Mr. Swierenga to avoid military service. His desire is to have a business to which he can return upon completion of military service."

Before the board made reply to the attorney's letter defendant sent an additional letter elaborating on his need for a 60-day extension to arrange his affairs, concluding with the statement:

> "I hope you will review my file once again and give me the sixty days I so desperately need to keep my business functioning while I am gone."

The draft board responded to defendant's request by letter dated September 20, indicating that his induction would be postponed if he would sign an application for voluntary induction in the board's December or January quota. By letter dated September 22, defendant thanked the board for its reconsideration and decision to grant a conditional extension but indicated that he would not be willing to volunteer for induction, stating:

> "However, I cannot comply with your stipulation that I must first volunteer for the draft. This is directly against my Religious principles. As a Christian, I do not believe it is for me to judge when another man shall die or to take his life, if I volunteer, the blood is on my hands and I shall be judged for it."

The board wrote defendant the next day advising that, if he "would not sign an application for volutnary induction," he would have to report as originally scheduled.

Defendant reported to the induction center on October 12, 1966, but refused to be inducted and signed a statement to the effect that his religious beliefs prevented his serving in the Armed Forces. Later, on January 25, 1967, he requested and received from the board a special form for conscientious objectors which was filed with the board on February 1, 1967. The board took no action on this request.

For the reasons stated in the memorandum opinion of the district judge and on authority of this Court's decisions in *United States, v. Ellis,* 415 F.2d 1122 (1969); *United States v. Brooks,* 415 F.2d 502, 509 (1969, *cert. denied,* — U.S. — (1970); *United States v. Mulloy,* 412 F.2d 421 (1969), *cert. granted,* 38 U.S.L.W. 3267; *United States v. Jennison,* 402 F.2d 51 (1968), *cert denied,* 394 U.S. 912 (1969); and *United States v. Taylor,* 351 F.2d 228 (1965).

The judgment is affirmed.

UNITED STATES DISTRICT COURT

Eastern District of Michigan, Southern Division

Criminal No. 42912

United States of America,
Plaintiff,

vs.

Paul Henry Swierenga,
Defendant.

OPINION AND JUDGMENT OF CONVICTION

The defendant has been indicted for refusing to submit to induction as ordered by his local Selective Service Board, 50 U.S.C. App. §463(a). A jury trial having been waived by the defendant, trial was had by the Court. The Court has before it a motion for acquittal on the ground that the local Board did not give appropriate attention to the defendant's claim that he is a conscientious objector. The facts are as follows:

On August 29, 1966 the defendant was mailed an induction notice ordering him to report for induction on October 11, 1966. On September 3 he wrote to the Board requesting a 60-day extention of his induction date to enable him to find and train another man to conduct his business during the period of his military service. The Board denied his request and he was so advised by letter dated September 7, 1966. On September 19 the defendant wrote asking reconsideration:

> "I hope you will review my file once again and give me the sixty days I so desperately need to keep my business functioning while I am gone."

In support he offered a letter from his attorney and a copy of a contract designating him an independent contractor for the distribution of check-writing machines.

On September 20 the Board responded as follows:

> "The Local Board will consider postponing your induction for sixty days if you will sign an application for voluntary induction to be forwarded for induction with our December 1966 or January 1967 quota."

The defendant replied on September 22 as follows:

> "Thank you for reviewing my file once again and reconsidering my application for a sixty day extension. Because you are willing to give me the sixty days is evidence to me that you realize that my request was not only valid but also reasonable and necessary.
>
> "However, I can not comply with your stipulation that I must first volunteer for the draft. This is directly against my Religious principles. As a Christian, I do not believe it is for me to judge when another man shall die, or to take his life. If I volunteer, the blood is on my hands and I shall be judged for it.
>
> "I am awaiting your reply."

The following day the clerk of the local Board acknowledged receipt of the letter and stated that "in view of the above ,this Local Board will not issue a Postponement of Induction (SSS Form 264) and you will be re-

quired to report as originally scheduled." On October 12 the defendant appeared at the induction station but refused to submit to induction. He stated:

> "I, Paul Swierenga, refuse to be inducted into the Army of the United States because as I stated in my letter to my Local Board, as a Christian I do not believe it is for me to Judge when another man shall die or to take his life."

On January 25, 1967 defendant requested and received a copy of Form SSS 150, the special form for conscientious objectors, which he filed on February 1, 1967. The local Board has not acted upon this request for change of classification.

The defendant's letter of September 22, 1967 to his Draft Board did not request a deferment as a conscientous objector. By stating that his religious beliefs prevented him from volunteering for the draft, it may be surmised that he meant to infer that he would serve if called upon to do so. In my opinion the Board did not err in failing to treat this letter as an expression of conscientious objection to service in the Armed Forces and was not required to furnish the defendant a form SSS 150 (the special for for conscientious objectors) upon receipt of this letter.

The local Board was first informed of the defendant's objection to service on conscientious grounds when he refused to submit to induction. It was not officially notified by the defendant himself until three and one-half months later. Defendant contends that the Board should have reopened his classification upon receipt of this request for a change of classification under the following regulations:

"32 CFR 1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control."

It is argued that the defendant's realization that he was a conscientious objector was a "change in registrant's status resulting from circumstances over which the registrant had no control," and therefore that the local Board should have reopened his classification despite the fact that notice of induction had already been sent. The defendant cites the case of *U. S. v. Gearey,* 368 F.2d 144 (2d Cir. 1966), in support of this proposition.

"The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments. The long history of exempting conscientious objectors, coupled with the specific *statutory* right of appeal, indicate to us a strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objecters, and indeed to grant deferments in appropriate cases. Implementation of that policy requires that any individual who raises his conscientious objector claim promptly after it matures—even if this occurs after an induction notice is sent but before actual induction—be entitled to have his application considered by the Local Board." *Ia.*, at 150.

I believe that the defendant's reliance upon the *Gearey* case is misplaced. The case before me is distinguishable from the circumstances of *Gearey* by the fact that here the defendant did not file his claim as a conscientious objector until after he had refused to submit for induction. This factor makes the case more nearly analogous to *United States v. Monroe*, 150 F. Supp. 785 (S.D. Cal. 1957) and *United States v. Bonga*, 201 F. Supp. 908 (E.D. Mich. 1962). In *Bonga*, with which I agree, the court stated:

"Defendant would have the court construe this regulation [32 C.F.R. §1625.2] to mean that a local board must consider a change-of-status claim interposed *weeks after* the registrant has refused induction. Such an interpretation could plunge the system of induction into chaos . . . the board is justified in declining to reopen a classification upon request made after the registrant has refused to submit to induction." 201 F. Supp. at 914.

Even aside from the question of whether a local Board is required to consider a claim of conscientious objection made after a refusal to submit, the case of *United States v. Watson Woodson Jennison, Jr.*, 402 F.2d 51 (6th Cir. 1968), would appear to be controlling here. In that case the Court of Appeals held that a draft board is not required to consider a conscientious objector claim first asserted after notice of induction has been received by the registrant, even if conversion to conscientious objection had allegedly matured after receipt of notice. *Id.*, at 52, 53. Quoting from its opinion in *United States v. Taylor*, 351 F.2d 228, 230 (6th Cir. 1965), the court stated, at page 53, that

> "It seems reasonable to this court (and in accord with the great weight of authority) for regulations of the selective service system to provide that a claim of conscientious objector status must be made before the individual concerned has been notified to report for induction."

The defendant also contends that the disposition of his request for a sixty-day extension made by the board on September 7, 1966 was invalid because it had not formally convened, but instead its members were called by the clerk of the board on September 6 in order to determine what their views were concerning this request. The case of *United States v. Walsh*, 279 F. Supp. 115, (D. Mass. 1968) is cited for the proposition that such telephonic communication was a denial of procedural due process to the defendant. This position would perhaps be well taken if the result of the conversations was material to the question of the defendant's claimed conscientious refusal to be inducted. These conversations were not concerned with the defendant's classification, however, and the board sub-

sequently did meet formally to determine whether or not the defendant should be granted the extension which he requested. I do not believe that, *on these facts*, the defendant was denied procedural due process by this practice by his local board.

For the reasons set forth above, the defendant's motion for acquittal must be, and hereby is, denied. The Court finds the defendant guilty of the crime with which he has been indicted and he is referred to the Probation Office of this court for a pre-sentence report.

Theodore Levin
United States District Judge

Dated: Detroit, Michigan
January 27, 1969

LETTER TO DRAFT BOARD

602 Naylor S. W.
Grand Rapids, Michigan 49509
January 25, 1967

Michigan Local Board No. 42
Kent County
45 Barclay N. E.
Grand Rapids, Michigan 49502

Gentlemen:

As you know, in October, 1966, I was to have been inducted into the Army of the United States.

All my life I have held sacred a human life which is given of God and an opposition to killing and violence on a purely religious basis. Although I had heard the term "Conscientious Objector," it was difficult for me to associate myself with this term, as I did not know what characterized a Conscientious Objector. I realize now that I should have requested SSS Form 150 when I was eighteen years old.

When the letter of September 20, 1966, from my local draft board requested me to sign for voluntary induction, I was shaken into the realization that I could not do this thing which the laws of man requested. Since I was not aware in any sense of the existence of SSS Form 150 at that time, I merely wrote to the board on September 22, 1966, that, "As a Christian, I do not believe it is for me to judge when another man shall die, or to take his life. If I volunteer, the blood is on my hands and I shall be judged for it."

Since my previous classification of 1-A had come from Detroit, and Since I was completely ignorant of the procedure I must follow to become reclassified, I assumed that by testifying in Detroit at the induction center, of my belief, I would then become reclassified. However, this was erroneous thinking on my part, although Lt. William K. Marvin, before whom I gave testimony, did agree that this mistake could easily occur.

Since no one at the induction center was able to reclassify me, and I was ordered "to refuse induction or go in like the rest of them", I was obliged to refuse induction.

As I say, being completely ignorant of the procedures involved in becoming a 1-O (a classification and term with which I was not familiar until January 15, 1967) and in obtaining alternative service, I had previously assumed that I would go directly to alternative service from the induction center. It was not then, and is not now, my desire to refuse induction or to shirk my responsibilities to my country! I did not want to break the law!

Following this incident, after which I was allowed to return home, I still was ignorant of the proper procedures to follow. I, therefore, did nothing until recently advised to procedures and different classifications of a Conscientious Objector, by a minister.

I realize that I am filling out SSS Form 150 five years late in my heart and at least six months late legally, but I appreciate this opportunity to do so and pray for an opportunity to be reclassified as 1-O at this late date.

I would also like to request a hearing at your convenience.

Sincerely,

/s/ Paul Henry Swierenga
Paul Henry Swierenga
(Selective Service No.
20-42-43-490)

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 275

PAUL HENRY SWIERENGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury-waived trial in the United States District Court for the Eastern District of Michigan petitioner was convicted of having wilfully refused to submit to induction in violation of 50 U.S.C. App. 462. The opinion of the district court appears at pages 22-28 of the appendix to the petition. Petitioner was sentenced to four years imprisonment. The court of appeals affirmed (Pet. App. 19-21).

1. The evidence showed that on August 29, 1966, petitioner was ordered by his local draft board to report for induction on October 11, 1966 (Tr. 24, 55). Petitioner wrote to the board on September 3, 1966, requesting a sixty day extension in order to allow him to find a replacement for his business (Tr. 55). On September 6, 1966, this request for a postponement was considered and denied by the local board (Tr. 46-47).

Upon receipt of the board's denial, petitioner contacted an attorney who wrote a letter to the local board on September 13, 1966, on petitioner's behalf reiterating the business reason for the postponement and stating that "it is not the desire of Mr. Swierenga to avoid military service" (Tr. 27, 56; Pet. App. 23). In addition, petitioner himself sent a letter giving a detailed account of his need for the extension in order to arrange his affairs (Pet. App. 22). On September 20, 1966, the local board considered the two letters, and agreed that the request for a postponement would be granted if petitioner would sign an application for voluntary induction in the board's December or January quota (Tr. 28, 56). After notification of the board's ruling, petitioner, on September 22, 1966, responded by letter, expressing appreciation for their reconsideration but stating that he would be unwilling to volunteer for the draft. He said (Tr. 56-57, Pet. App. 23):

> However, I can not comply with your stipulation that I must first volunteer for the draft. This is directly against my religious principles. As a Christian, I do not believe it is for me to

> judge when another man shall die, or to take his life. If I volunteer, the blood is on my hands and I shall be judged for it [Tr. 56-57; Pet. App. 23].

The following day the local board responded that, if petitioner would not sign an application for voluntary induction he would be required to report as originally scheduled (Pet. App. 23-24).

On October 12, 1966, petitioner reported, but refused to submit to induction. At this time he filed a brief written statement in which he set out his reason for refusing to be inducted: "As a Christian, I do not believe it is for me to judge when another shall die, or to take his life" (Tr. 24; Pet. App. 23).

On January 25, 1967, petitioner appeared at the office of the local board to obtain a copy of Form SSS 150, the special form for conscientious objectors (Tr. 35, 70). He submitted the completed form on February 1, 1967 (Pet. App. 29-30), but the local board took no action.

Petitioner asserts that his statement regarding his reasons for refusing voluntary induction contained in his letter dated September 22, 1966, constituted a declaration of his conscientious objection beliefs, which the board was bound to consider under *United States* v. *Gearey*, 368 F. 2d 144 (C. A. 2), certiorari denied, 389 U. S. 959. Whether or not crystallization of conscientious objection beliefs after the mailing of an induction order is a circumstance over which the registrant has no control under 32 C.F.R. 1625.2 is an issue presently before the Court in *Ehlert* v. *United States*, No. 120, this Term. Peti-

tioner's letter of September 22, however, hardly qualifies as a notification of conscientious objector beliefs; rather it seems only to differentiate between voluntary and mandatory conscription. Petitioner did not assert to any federal authority beliefs in the nature of an unqualified conscientious objection to military service, until he furnished a written statement to induction center officials on the date he refused induction.[1]

This case is, thus, analogous to the situation presented in *United States* v. *Holmes*, certiorari pending, No. 111, 1970 Term, where the government is seeking review of a decision that a registrant could validly offer a last minute oral claim of conscientious objection at the induction station. An affirmance of *Ehlert* would control the disposition of this case and *Holmes*. In the event of reversal, the narrower question posed by the conflict between the decision below and *Holmes* would require resolution. Accordingly, it would seem appropriate to defer action on the present petition until *Ehlert* is decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

[1] The local board itself was not formally notified of petitioner's claim until several months after petitioner refused induction.

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